In the Supreme Court of the United States

OCTOBER TERM, 1974

No. 74-17

ANN E. BIBLER, ADMINISTRATRIX OF THE ESTATE OF RALPH BIBLER, DECEASED, ET AL., PETITIONERS

v.

BERRY H. YOUNG, JR., ET AL.,

AND

THE UNITED STATES OF AMERICA AND THE FEDERAL AVIATION ADMINISTRATION

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

MEMORANDUM FOR THE FEDERAL RESPONDENTS IN OPPOSITION

This tort suit arose out of a mid-air collision between two aircraft, designed as 39 Juliet and 18 November, in April 1968, at Port Columbus Airport, Columbus, Ohio, which resulted in the death of Ralph Bibler, the pilot of 39 Juliet.

At the time of the accident, 39 Juliet was completing a second practice approach to runway 28 left as part of

the instruction in instrument landing techniques[1] that Bibler was providing to a student pilot (Pet. App. 23). At all relevant times, including the moment of impact, the radio in 39 Juliet was tuned to the frequency used by Approach Control,[2] and not to the frequency utilized by Local Control, even though three minutes before the collision 39 Juliet passed from Approach Control's jurisdiction into the jurisdiction of Local Control. Bibler also did not tell Local Control that he had passed into its jurisdiction (Pet. App. 28).[3]

Respondent Young, the pilot of 18 November, had been flying under visual flight regulations which were in effect at the time (Pet. App. 23). Accordingly, he was not required to, and did not communicate with Approach Control (Pet. App. 22, 28). Young did receive clearance from Local Control, however, to land on runway 28 left. As Young turned left to land, the configuration of his aircraft was such that he could not see 39 Juliet, which 18 November overtook from above, and the two planes collided (Pet. App. 18, 31).

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[1]The instruction technique included the student's use of a "hood" —a vision limiting device which focuses the attention of the student upon the instruments in the aircraft. Bibler's vision was unobstructed (Pet. App. 23).

[2]The Federal Aviation Administration, which is responsible for the control of air traffic in and around Port Columbus, has divided its function into (1) Local Control, which controls traffic within a five-mile radius from the control tower, and (2) Approach Control, which controls traffic outside this radius. Local Control and Approach Control transmit and receive on separate radio frequencies (Pet. App. 21-22).

[3]On the first practice approach, 39 Juliet had properly contacted Local Control when it passed into its jurisdiction (Pet. App. 24).

Petitioner Ann Bibler, as the administratrix of her husband's estate, sued the United States under the Federal Tort Claims Act and the pilot, owner and operator of 18 November (Young, Ohio Aviation Company and Aviation Distributors, Inc.) to recover for the wrongful death of her husband. The United States cross-claimed for indemnity against the other co-defendants. The case was consolidated for trial with a second action filed by the decedent's employer against the United States for the value of 39 Juliet. In this second action, the United States filed a third party complaint against the other co-defendants, and Ohio Aviation, the owner of 18 November, counter-claimed for damages to its plane (Pet. App. 3).

The district court found that Bibler's failure to contact Local Control after passing into its jurisdiction was negligence and a proximate cause of the accident, and that Young was not negligent (Pet. App. 34). The court held that under the applicable law of Ohio, Bibler's contributory negligence was a complete bar to any recovery by plaintiffs, even though "it may be asserted that [the Approach Controller] was also negligent in failing to instruct 39 Juliet to contact the Tower * * *" (Pet. App. 30).[4] The court also rendered judgment against Bibler's estate in the amount of $17,000 for damages to 18 November (Pet. App. 18). The court of appeals affirmed, stating that the trial judge's findings were "support[ed] by the great weight of the evidence in this record" (Pet. App. 14). Further review by this Court of the factual findings below is not warranted.

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[4]Since Local Control was not advised of Bibler's presence by either Bibler or Approach Control, the court found that Local Control was not negligent (Pet. App. 30, 31). Since Bibler's negligence continued to the point of impact, the court also concluded that the doctrine of last clear chance was inapplicable (Pet. App. 31, 32).

There is no substance in petitioners' contention (Pet. 5-8) that the court of appeals' decision here conflicts with decisions of other circuits "as to the standard of care required of Government air traffic controllers." The district court apparently found that the Approach Controller was negligent in failing to advise the Local Controller that 39 Juliet had passed into its jurisdiction (Pet. App. 30-31) and the court of appeals did not disagree with this finding (Pet. App. 3, 18). Bibler's own failure to contact Local Control, however, deprived it of the knowledge required to warn and separate the converging planes. Bibler's contributory negligence was thus a proximate cause of the accident (Pet. App. 30,31). Since the decisions below were based upon Bibler's contributory negligence, and not upon the standard of care required of government air traffic controllers, the "conflict of decisions" asserted by petitioners is illusory.

Similarly baseless is petitioners' claim (Pet. 8 11) that the courts' construction of 14 C.F.R. 91.87(b), requiring pilots to maintain communications with "the control tower" (Pet. App. 1), raises "significant problems important to the safe operation of air travel." The courts held that Bibler failed to comply with this regulation when he did not communicate with Local Control on passing into its jurisdiction. This construction, which is entirely correct,[5] does not absolve air traffic controllers of any responsibilities, but simply imposes upon pilots the responsibility to communicate with Local Control when their aircraft

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[5]Petitioners' claim that the term "control tower" in Section 91.87 (b) includes "Approach Control" is based upon a semantical confusion with use of the term in other contexts, and, as the court of appeals noted, entirely ignores the purpose of the regulation (Pet. App. 14-15).

pass into the latter's jurisdiction (Pet. App. 15-18, 34). Moreover, the court of appeals noted that, aside from the regulation, the weight of expert testimony at the trial established that the reasonably prudent pilot in Bibler's circumstances would have notified Local Control of his location (Pet. App. 15-17).

Finally, as to the negligence of Young in failing to yield the right of way to Bibler (Pet. 12-14), the United States took no position in the courts below and does not take a position here.

It is therefore respectfully submitted that the petition for a writ of certiorari should be denied with respect to the federal respondents.

ROBERT H. BORK,
Solicitor General.

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